SERVED: May 23, 2003

NTSB Order No. EA-5040

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of May, 2003

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. CHARLES E. DUCHEK, Respondent.	Docket SE-16842

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on April 17, 2003, following an evidentiary hearing.[1] The law judge dismissed the Administrator's emergency order of revocation. We grant the Administrator's appeal and reverse the initial decision.

Respondent is the owner (with his wife, who participates

[1] The initial decision, an excerpt from the transcript, is attached.

only as a shareholder), chief pilot, and flight instructor of Midwest Aeronautical Training, Inc., a Part 135 helicopter operator. At the relevant time, respondent was also the company's antidrug program manager and its "Designated Employer Representative" (DER), responsible for the firm's required drug and alcohol program (including the testing portion). See 49 C.F.R. 40.3. The Administrator's order alleged that respondent had violated 14 C.F.R. 61.14(b) of the Federal Aviation Regulations, by refusing to take a random drug test.[2] Respondent generally contended that he did not "refuse" to take the test. Rather, he forgot, and the company (hereafter, CCM) he had hired to assist (termed his service agent or third party administrator in the regulations) had not scheduled one. Thus, as there was no scheduled date and time, he argues, he cannot be said to have refused, and had no intent to refuse.

The facts are straightforward. At the beginning of October 2002, respondent, as DER, received a notice from CCM that he and a Mr. Hestop[3] had been randomly selected for testing (he for drugs and alcohol, Mr. Heslop for drugs only[4]). Exhibit A-2,

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[2] Section 61.14(b) provides that refusal by a certificate holder to take a drug test is grounds for revocation or suspension of existing certificates, ratings, and authorizations.

[3] Actually Heslop. Tr. at 102.

[4] The Administrator's complaint originally charged respondent with refusing both drug and alcohol testing. At the hearing, the Administrator amended the complaint to remove the alcohol references and charges, explaining that alcohol is only a prohibited substance when the individual is performing in a safety sensitive position (otherwise, no one in aviation could risk a drink for fear of random testing at any time). Respondent (continued…)

page 4. The form provided respondent by CCM had blanks labeled "suggested test date" and "notification date/time" but they were not filled in. Respondent directed that Mr. Heslop go for testing, and he apparently did. Mr. Fettik, CCM's president, testified that individuals could appear at any time for testing; they did not need to call first. Respondent testified to his belief that calling first to make an appointment was their practice. He explained that in this case he simply forgot to schedule his own test.

The law judge concluded that Midwest's testing program did not comply with the regulations. Because respondent received notice that he had been selected to be tested, the law judge found, his selection was not random. He stated:

> And as Mr. Neal said, if there is an announcement, it can't be random, if it is open ended. And here it was open ended. And the suggestion that this could be cured simply by requiring as soon as they open the mail, they go immediately for testing, leaves so many loopholes that it is almost frightening, because all a person has to do is say, hey, I didn't open the mail until Friday, when in fact they opened it Monday, and they didn't do drugs all week, so that just defeats the purpose. The purpose, the bottom line here it has to be random testing. If somebody gets notice that they have been selected and they are not scheduled in, that is not random…. [H]ere there was a selection for a random test, but there was no scheduling and therefore, to hold a certificate holder in non compliance and subject to revocation under these facts, I think, has not been established. And specifically, I find that there was no random drug test scheduled for this individual….

Tr. at 218-219. The theory of the law judge's analysis, it appears, is that if the drug testing program does not meet the

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was not performing in such a position at the time.

regulatory requirements, then no violations can be found.

Leaving aside the logic of that conclusion on the facts of this case, we disagree with the law judge's determination that tests were not unannounced and random. Random testing requirements are set forth in the regulations and were explained by witness Fettik. Random selections are computer generated using social security numbers as identifiers. See 49 C.F.R. 121 Appendix I, Tr. at 29-30. There is no evidence that respondent's selection was not random.[5]

It is true that, in a sense, respondent's selection was not unannounced in the same way it was for other employees. As the DER, respondent is the one who received CCM's notices that random tests were to be performed. It was his responsibility, when another employee was chosen, to direct that employee to present himself at CCM for testing. It may be that the Administrator should reconsider the practices of allowing persons subject to testing also to be DERs and not requiring the notice to the DER to contain a time and date or period of time for the scheduled testing. Without the latter specificity, the rules are open to uncertainty in their application and an element of this important program could be the subject of time consuming and unnecessary litigation. In this case, however, we are satisfied that respondent should be held accountable for failing to ever appear

[5] Respondent could expect to be frequently chosen, as random testing is done quarterly (Tr. at 29) and there were only three individuals in the pool.

for testing. He chose the responsibilities of the DER, and received training regarding them. And as the DER, and owner of the company, he had a clear responsibility to comply with the letter and the spirit of the antidrug program.[6] As the FAA's witness Neal testified, for a DER subject to random, unannounced testing, this meant that, right after he read the Exhibit A-2 letter from CCM identifying him as a random testing subject, he was obliged to present himself for testing. There is nothing surprising about this; it is the obvious conclusion if the testing program is to have any integrity. Indeed, respondent testified that on other occasions when he was randomly selected, he called CCM as soon as he received the notice to arrange a time for the test. Tr. at 152.

Respondent did not do so and his excuses are unacceptable for a number of reasons. First, the responsibility was his, not CCM's. Reminding was not a service CCM provided, nor could it realistically do so. Under the regulations, the service agent may assist the carrier in certain functions, not absolve it of its primary responsibility to maintain a drug-free workplace. Indeed, the quality of the assistance is only as good as the information the client provides. See, e.g., Tr. at 90-91. Second, respondent claims that it should be Midwest, not him personally, who is called to account. But prosecuting one does

[6] Contrary to the law judge, we will not assume the likelihood of DER cheating. In any case, this has nothing to do with whether respondent violated the cited regulation in his failure to

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not preclude prosecuting the other. Individual certificate holder responsibility is enforced by 14 C.F.R. 61.14; an investigation of Midwest's compliance is pending. Third, respondent claims that many things came up in October that made him forget about going to be tested. But this is beside the point. Once he got the notice, he had to appear for the test in a timely manner. Respondent did not testify that an emergency existed at the exact time he received the testing notice (and we do not opine on the proper result in such a case). Further, he apparently had the time to perform his DER function to the extent of having Mr. Heslop get tested.

There is no purpose to random, unannounced testing if you can wait a few days or weeks and allow the drugs to leave your system by claiming the press of other work. (In contrast, in the case of Mr. Heslop, as long as respondent did not tell him that he had been chosen to be tested, respondent could wait and pick the day or time to tell him to go and he promptly complied; it would still be an unannounced test.)

Under the terms of the regulation, respondent's failure to appear constitutes a refusal to take the test. On the facts of this case, especially respondent's apparent lack of compliance disposition and despite respondent's financial concerns, we have no difficulty agreeing with the Administrator that the refusal

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(continued…)
present himself for a drug test.

should result in revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator’s appeal is granted;

2. The initial decision is reversed; and

3. The order of revocation is affirmed.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA and HEALING, Members of the Board, concurred in the above opinion and order. Member CARMODY had voted to affirm the law judge on May 8, 2003, but was unable to join the Board when it met to decide this case.